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CHARLES ELMORE CROPLEY

No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, APPELLANT

v.

ARNOLD L. DAILEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE UNITED STATES

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I

UNDER THE CRIMINAL APPEALS ACT ONLY THE QUESTION PASSED UPON IN THE DISTRICT COURT IS OPEN IN THIS COURT

The suspension provision here involved applies to offenses "involving fraud or attempted fraud against the United States * * *." Appellee Dailey suggests in his brief in this Court for the first time that the offense with which he is charged does not involve fraud against the United States. This point was not raised in the court below and was not the basis of decision below. We therefore do not believe that it can be considered by this Court on the Government's appeal under the Criminal Appeals Act.

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United States v. *Borden*, 308 U. S. 188, 193, is, we think, controlling. It held that in a case arising under the Criminal Appeals Act, "When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case."

Its compelling applicability becomes clearer when the decision is considered in relation to the contentions made. The *Borden* case involved a prosecution charging combination and conspiracy in violation of Section 1 of the Sherman Anti-Trust Act. The defendants included milk distributors, a cooperative marketing association of producers, a labor union whose members were engaged in the distribution of the milk, and officers of all of these organizations. Various challenges were made to the indictment by demurrers and motions to quash. The labor union defendants contended that by virtue of certain provisions of the Clayton Act and of the Norris-LaGuardia Act, neither the union nor its officers was subject to prosecution under Section 1 of the Sherman Act. This objection was not passed upon by the District Court. It held, so far as here relevant, that the production and marketing of milk products were removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of 1937, and that the defend-

ants cooperative marketing association of producers and its officers and agents were also exempt from prosecution under the Sherman Act by virtue of the Capper-Volstead Act. Consequently, the District Court sustained the demurrers and dismissed the indictment.

This Court held that its jurisdiction rested on that portion of the Criminal Appeals Act which permits review where a decision quashing or sustaining a demurrer to an indictment is based upon the "construction of the statute upon which the indictment is founded." It examined the correctness of the construction placed by the District Court on the Sherman Act and the effect on it of the Capper-Volstead and Agricultural Marketing Agreement Acts, and concluded that they did not preclude the prosecution under Section 1 of the Sherman Act. It then made the following holding, bearing particularly on the claim of the labor union, and on the specific problem before this Court in the instant case:

> Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is

> confined to the question of the propriety of that construction [pp. 206–207].
>
> * * * * *
>
> Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question [p. 208].

Thus, this Court held that, even though the labor union raised a question of statutory construction which, had it been decided favorably to the union by the court below, could have been appealed under the Criminal Appeals Act, and which, if upheld, would have precluded prosecution of the union, the question was not open on the Government's appeal from the District Court's decision. That is the situation here.

The *Borden* case draws on a long line of cases which emphasized the limited scope of the Criminal Appeals Act in opening the record of the case in this Court. Many of them concern only a refusal by the Court to permit challenges to defects in the indictment which do not concern matters of construction. Nonetheless, the language of the Court shows what was early recognized to be effective limits of the Act.*

*In *United States* v. *Gilliland*, 312 U. S. 86, the district court dismissed an indictment under the false claims statute,

In *United States* v. *Keitel*, 211 U. S. 370, 397–399, after sustaining the District Court's construction of the statute involved, this Court said:

> Finally, we come to the two contentions of the Government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting either that the court below misconstrued the indictment, or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on this writ of error to consider these questions. [The Criminal Appeals Act] * * * plainly shows that in giving to the United States

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section 35 (A) of the Criminal Code, on the ground that no pecuniary loss to the Government was involved. It did not pass on an additional objection that the Connally Act, by dealing comprehensively with hot oil violations, made section 35 (A) inapplicable to such violations. This Court, after reversing the district court and holding section 35 (A) applicable, also held that the Connally Act did not effect a partial repeal of that section. But reversal on the question passed on by the district court necessarily required a holding that section 35 (A) was still in force as a basis of liability. This is not inconsistent with *Borden*. The decision there that the Sherman Act was not rendered inapplicable by the Capper-Volstead and Agricultural Marketing Agreement Acts did not expressly or implicitly affect the contention that labor unions and their officials were exempt by the Clayton Act. Equally, a decision that the suspension act embraces offenses committed after December 31, 1946, does not expressly or implicitly affect the contention that the offense committed by Dailey does not involve fraud.

> the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reexamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same. . . . .

In *United States* v. *Kissel*, 218 U. S. 601, decided very shortly after the *Keitel* case, Mr. Justice Holmes, for the Court, made it clear that the narrow scope of review on appeal was not affected by the fact that the appeal arose out of the granting of a plea in bar. This, of course, is the nature of the order in the case now before the Court. *Kissel* was an anti-trust case in which

the District Court had sustained a plea of the statute of limitations. At pages 606–607, the Court said:

> * * * the only question before us * * * is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged.

Similar holdings and language may be found in *United States* v. *Miller*, 223 U. S. 599; *United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Moist*, 231 U. S. 701; *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *Shrader's Sons*, 252 U. S. 85, 98; *United States* v. *Yuginovich*, 256 U. S. 450, 461. And see, more recently, *United States* v. *Hastings*, 296 U. S. 188, 192:

> * * * the construction of the indictment and its sufficiency merely as a pleading, as distinguished from the construction

> of the statute, are questions for the District Court. We must accept the construction of the indictment as that court gives it. And where that court has rested its decision upon the invalidity or construction of the statute which underlies the indictment, this Court will not go beyond those grounds and consider other objections to the indictment. * * *

The propriety of giving this limited scope to the act has received fairly recent approval in a concurring opinion of Mr. Justice Frankfurter. In *United States* v. *Petrillo*, 332 U. S. 1, 14, he stated:

> The case is here under the Criminal Appeals Act of 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, * * * whereby a direct review can be had of a district court judgment setting aside an indictment or information if the decision of the district court is based "upon the invalidity or construction of the statute upon which the indictment or information is founded." Our decisions have construed this to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute. A criminal case cannot be reviewed here if questions of criminal pleading—defects not arising from the statute under consideration—enter into a decision sought to be reviewed. * * * If both the sufficiency of criminal pleading and the validity or construc-

> tion of the underlying statute were in issue before the District Court, and views as to both were interwoven in the court's decision, this Court has no jurisdiction to entertain the appeal. * * * On the other hand, if the question of constitutional construction was the isolated ground of decision by a district court dismissing a federal prosecution, that is the only question to be considered here and it must be considered within the scope given it by the district court. Other questions may be imbedded in the case which may eventually come to the surface. But they are not brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading, and to statutory or constitutional questions not passed upon by a district court, that Mr. Chief Justice Hughes had reference when he said, "The Government's appeal does not open the whole case." *United States* v. *Borden* * * *.

Thus, we think that under the holdings and language of this Court, the issue of fraud sought to be raised by Dailey is not properly subject to consideration on an appeal under the Criminal Appeals Act.[1]

[1] The general rule, on which appellee relies, that an appellee may support a judgment on any ground apparent of record is not in point here because of the narrow scope of review under the Criminal Appeals Act.

II

THE CRIME CHARGED INVOLVED FRAUD ON THE UNITED STATES WITHIN THE MEANING OF THE SUSPENSION PROVISION

Assuming that appellee has standing to raise the question as to whether the offense charged involves fraud within the meaning of the suspension statute, the judgment of the district court should nevertheless be reversed. The statute suspends the running of limitations for "any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * *." The indictment is laid under former Section 35A of the Criminal Code, 18 U. S. C. (1946 ed.) 80 (reenacted as 18 U. S. C. 1001), which punishes one who "knowingly and willfully" makes a "false or fraudulent" statement in "any matter within the jurisdiction of any department or agency of the United States." Specifically, the indictment charges that appellee knowingly and willfully made a false and fraudulent statement as to his assets in a matter within the jurisdiction of the Department of Agriculture, i. e., "in connection with the defendant's application for Farmers Home Administration services" (R. 1). A mere reading of the indictment, we submit, makes it clear that it charges an offense involving "defrauding the United States * * * in any

manner," within the meaning of the suspension statute.

Appellee argues that to be within the purview of the suspension statute the offense charged must be laid under a statute which (1) by definition makes intent to defraud the United States an element of the offense, and (2) requires proof of pecuniary loss to the United States. Nothing in the language or the legislative history of the suspension provision, however, supports this construction. On the contrary, they show that the suspension provision should be construed broadly to encompass frauds against the Government, however they may arise, and that no technical mechanical concepts were intended to limit its scope.

A. *The language of the suspension provision indicates that it should be broadly construed.*— The language of the statute indicates its broad intent. The use of the word "involving" in connection with fraud suggests that the fraud element of the offense is not to be measured with precision, but that some relationship between the offense and fraud will suffice. The provision refers to "any offense." It refers to offenses involving defrauding the United States "whether by conspiracy or not" and "in any manner." This, again, is language of generality. It indicates a specific congressional purpose not to have

the basic aims of this legislation thwarted by technical construction.[2]

The language is inconsistent with a purpose to include only limited kinds of fraud, or to include frauds which arise only under neatly drawn provisions saying, in so many words, "This involves fraud." The language used indicates recognition that the kind of conduct with which the provision deals is not subject to precise moulding. To deny broad application of this provision is to deny effectiveness to a common and useful legislative technique for signaling to courts that the proper touchstone for particular construction problems is liberality.

Aside from these internal evidences of broad purpose, we must ascribe logic to the provision. The singling out of cases involving fraud for suspension of the statute of limitations obviously stems from the fact that fraud may not be discovered until a considerable time after the offense has been committed. That factor is involved whether the spoils be cash or privileges; the impairment of government functions is as effective. There is no logic to drafting a statute which is concerned with protecting the Government against the effects of deceptive behavior, and then limit-

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[2] The absence of the words "for any purpose" as in the general conspiracy provision does not, we submit, justify appellee's contention that the otherwise general words which were used acquire suddenly a narrower meaning than they normally bear.

ing it to those cases where the deception causes the Government pecuniary or proprietary losses, or to those where the fraud is neatly spelled out. Such an approach ignores the underlying policy against deceits.

B. *The legislative history of the Suspension Act also indicates that it should be broadly construed.*—The legislative materials relating to the Suspension Act emphasize, we submit, the correctness of our view of the statute, and demonstrate that Congress had Section 35A specifically in mind when it legislated on this question. The statute was initially enacted as the Act of August 24, 1942, 56 Stat. 747, and provided—

> * * * That the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. * * *

Its purpose was to suspend the running of the statutes of limitation applicable to offenses involving the defrauding of the Government. As the Committee Reports[8] state, experience during the first World War showed that many offenses involving fraud on the Government were barred

[8] H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong., 2d sess.

because they had not been discovered within time to prosecute during the three year period of limitations.[4] In the words of both Committee Reports—

> During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.
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> Your committee is of the opinion that action should be taken at this time to ex-

[4] In 1921 a proviso was added to the three year statute of limitations extending the period to six years for offenses involving fraud on the Government. Act of November 17, 1921, 42 Stat. 220. The extension was repealed in 1927. Act of December 27, 1927, 45 Stat. 51.

tend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.

While these reports make evident that Congress was concerned with frauds arising out of the armament program, its recognition that the law enforcement branch of the Government was too busily engaged in other duties to be able to uncover many hidden frauds suggests that the statute was intended to cover, not only pecuniary fraud, but also any attempt to defraud the United States in any manner.

The 1942 Act was first amended by the Contract Settlement Act of 1944, which provided in Section 19, the enforcement provision, as follows (58 Stat. 649, 667):

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C. Supp. II, sec. 590a), is amended to read as follows:
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> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection

with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

House Report 1590, 78th Cong., 2d Sess., p. 28, explained this provision as follows:

> Subsection (b) amends the Act of August 24, 1942 (56 Stat. 747). This amendment suspends until 3 years after the termination of hostilities the running of any existing statute of limitations applicable to any Federal offense involving fraud, against the United States or connected with the negotiation, procurement, award, performance, payment for interim financing, cancelation or other termination, or settlement of any war contract.

The suspension of limitations provision was further broadened in the Surplus Property Act

of 1944, 58 Stat. 765, 781, to include any offense committed in connection with the care and handling and disposal of property under that act.

These amendments in no way show an intention to restrict the meaning of the word "fraud" in the first clause. As to contract settlement and surplus property offenses, Congress suspended the statute of limitations even though fraud may not be involved. Thus, in these limited fields, the statute is suspended although the crimes may not be hidden. These amendments indicate congressional recognition that, because of the hugeness of the programs involved, law enforcement agencies might be unable to handle even open and notorious crimes. They thus tend to confirm our view of the suspension provision as designed to give law enforcement agencies more time to uncover and prosecute crime because of the congressional recognition that such agencies were preoccupied with matters more directly arising out of the war.

That Congress, in using the term "fraud" was not construing it in any narrow sense is shown by Section 19 (d) of the Contract Settlement Act of 1944, enacted at the same time as the suspension provision embodied in 19 (b). Section 19 (d) provided (58 Stat. at 668):

> (d) The provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80) shall apply to any statement, representation, bill, receipt, voucher, roll, account,

> claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

Of this subsection, H. Rep. 1590, 78th Cong., 2d sess., stated (p. 28):

> Subsection (d) deals with the criminal penalties for fraud. It makes clear that the provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80) also apply to any such statement, representation, or other document made or used or caused to be made or used for any purpose under the act. Section 35–A imposes criminal penalties up to 10 years' imprisonment for fraudulent actions involving the Government.

This label of fraud was attached to crimes under the False Claims Act at the very time when the provisions of the suspension act, suspending limitations on crimes involving fraud, were before Congress. It indicates clearly that Congress did not think of fraud in any restricted, technical sense, and specifically that Congress deemed prosecutions under Section 35–A within the purview of the Suspension Act.

C. *An offense under the False Claims Act is an offense involving the defrauding of the United States.*—Appellee's argument that the suspension act applies only to statutes where by definition intent to defraud the United States is made an element of the offense stems from the decision of

this Court in *United States* v. *Noveck*, 271 U. S. 201. This Court there held that the proviso attached to the statute of limitations in 1921,[5] the language of which is similar to that of the present suspension provision, did not apply to an indictment for perjury, even though that perjury was in regard to income tax due, because the "purpose to defraud the United States is not an element of the crime defined in § 125, on which the indictment is based" (p. 203).

The Court observed (271 U. S. at 204) that the purpose of the proviso was "to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration.[6] But perjury as defined by § 125 does not contain any such element."

We may assume for present purposes that, under the *Noveck* decision, fraud against the

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[5] R. S. 1044, as amended, 18 U. S. C. [1946 ed.] 582, which read as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. * * *"

[6] This is the general conspiracy section, now § 371 of the Criminal Code.

United States must be an "ingredient" under the statute defining the crime. Fraud against the United States must thus be factually relevant to the proof of the crime. But this does not necessarily mean that the statute must spell out intent to defraud the United States as an element of the statutory definition. The *Noveck* decision is consistent with the position that if, under the statute involved, the elements which must be proved necessarily establish fraud against the United States, then fraud is "involved".

Noveck was indicted under the general perjury statute which does not distinguish between those falsehoods which involve the United States and those which do not. For example, perjury in the course of private litigation will not directly affect the interests of the United States, pecuniary or otherwise. Fraud on the United States is thus not an essential element of the crime of perjury as defined by the statute.

The False Claims Act, on the other hand, applies only to false claims against or statements to the United States. Those statements must be knowingly and willfully false or fraudulent. Any knowingly false claim or statement must *ipso facto* be an interference with the proper functioning of a government agency and thus *ipso facto* an interference with the proper functioning of the government of the United States. It thus must necessarily result in the defrauding of the United States.

It is significant that in the *Noveck* case this Court referred to the general conspiracy statute as an example of the type of statute which made fraud an ingredient of the offense. For many years before that decision, this Court had made it plain that a conspiracy to defraud the Government includes, not only causing it pecuniary loss, but also interfering by deception or trickery with the lawful functioning of any department of the Government. *Haas* v. *Henkel,* 216 U. S. 462, 479–480, and cases cited; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188. The making of a false and fraudulent statement to a department of the Government is such an interference with the lawful functioning of that department. See *United States* v. *Gilliland,* 312 U. S. 86, 93. Moreover, as we have noted above, Congress at the time it extended the suspension provision in the Contract Settlement Act, specifically referred to crimes under Section 35A as crimes involving fraud.

Appellee's reliance on *United States* v. *Scharton,* 285 U. S. 518, and *United States* v. *McElvain,* 272 U. S. 633, is misplaced. Those decisions turned on the fact that the cases involved offenses under the internal revenue laws, which carried their own separate limitations provisions. In the *McElvain* case, the Court held that the 1921 proviso could not extend to a conspiracy to defraud the United States by attempting to violate the internal revenue laws, because the basic statute

of limitations, to which the proviso was attached, did not operate on internal revenue violations. In the *Scharton* case, the Court was construing the special internal revenue limitations statute, which contained a proviso similar to the 1921 general proviso. Since criminal violations of the internal revenue laws usually involve fraud against the United States, the Court found it necessary to distinguish between those internal revenue statutes which made intent to defraud a definitional element of the offense and those which did not. The artificial distinction thus drawn was shortly corrected by amendment of the provision, *Braverman* v. *United States*, 317 U. S. 49, 54–55.[7] It cannot be assumed that in carrying over the language of the general 1921 proviso in the World War II suspension act, Congress intended to adopt a judicial construction based on the special situation arising under the internal revenue laws which Congress had immediately corrected.

Moreover, in both the *McElvain* and *Scharton* cases, the Court noted that it was construing the provisos narrowly precisely because they were provisos. The Wartime Suspension of Limitations Act here involved was separately enacted to forward a general policy. This very placement, as opposed to its earlier placement as an adden-

[7] Committee reports on the amendment specifically referred to the *Scharton* case. See H. Rept. 1492, 72d Cong., 1st sess. (1932), p. 29.

dum to the basic limitations provision, suggests that it should be more broadly construed.

The World War II suspension provision was specifically held to apply to an indictment under the False Claims Act in *United States* v. *Gottfried*, 165 F. 2d 360 (C. A. 2), certiorari denied, 333 U. S. 860. There the defendants had filed a false statement with the Office of Price Administration as to their 1941 sugar consumption in order to get a larger 1942 allocation. The court adverted to the definition of fraud in conspiracy cases as including any conduct calculated to obstruct or impair the efficiency of the United States or destroy the value of its operations or reports. It then observed that it saw no reason for reading the words "defrauding the United States" in the suspension provision any less broadly. It obviously appreciated that under both statutes, the range of possibilities for defeating the aims of Government was wide, and that both had a similarly broad purpose, however different their technique, to aid the Government to protect itself in an essentially indefinable area.[8]

D. *The fraud involved need not be pecuniary fraud.*—The points already made as to the lan-

[8] The *Gottfried* case was in many ways an application of an earlier Second Circuit case, *Miller* v. *United States*, 24 F. 2d 353, certiorari denied, 276 U. S. 638, where the words "involving fraud" in the 1921 proviso were held to apply to a conspiracy to defraud the United States by depriving it of the impartial services of its employees. It there appeared that defendant in conspiracy with the then Alien Property Cus-

guage, legislative history, and judicial construction of the suspension provision, have in large part already answered appellee's contention that fraud for the purpose of the suspension provision must involve pecuniary fraud on the United States.

Certainly the language of the provision draws no such distinction. Nor, as we have shown, does the legislative history support such a view. On the contrary, the legislative history indicates that Congress thought of offenses under Section 35A without distinction as offenses involving fraud on the United States.

Appellee seeks support for his position in *United States* v. *Cohn*, 270 U. S. 339, where the Court in dealing with Section 35 of the Criminal Code, as if read at that time, said (pp. 346–347) that fraud in its "primary" meaning meant "cheating the Government out of property or money" and that only the secondary meaning encompassed "interfering with or obstructing one

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todian and the then Attorney General had arranged to have an improper claim of some six and one-half million dollars allowed out of the funds under the control of the custodian. The indictment was framed under the provisions of the general conspiracy statute, and the court in holding it not barred by the statute of limitations, observed that the word "fraud" was used comprehensively in both provisions.

See also *Weinhandler* v. *United States*, 20 F. 2d 359 (C. A. 2), certiorari denied, 275 U. S. 554, where an indictment for embezzlement was held to be subject to the 1921 proviso on the ground that the word embezzlement itself implied fraudulent conduct.

of its lawful governmental functions by deceitful and fraudulent means." The Court was there dealing with Section 35 before its amendment in a case in which the party acutally cheated was not the United States but the consignor of goods.* The Court emphasized that the word "defrauding" was used in that statute "in connection with the words 'cheating or swindling,' indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss," a meaning further emphasized "by other provisions of the section in which the word 'defraud' is used in reference to the obtaining of money or other property from the Government by false claims, vouchers and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the Government, with no reference to the impairment or obstruction of its governmental functions."

Before the present suspension provision was passed, however, Section 35 had been amended

*In the *Cohn* case, goods had been shipped to the United States under a bill of lading. The bank to which the bill had been sent was instructed not to surrender it until defendant had made certain payments. Without having made the payments, defendant represented to the United States customs officials that the bill was delayed, posted bond for its production, and took the goods. The party who was "cheated" in a proprietary sense was the consignor of the goods, not the United States.

to its present form and this Court in *United States* v. *Gilliland*, 312 U. S. 86, refused to apply to the amended statute the narrow concept of fraud it had applied in the *Cohn* case. It noted that the language indicating the limitation it had earlier enforced had been changed. It observed (p. 93) that "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

The only case which supports the proposition that a pecuniary or proprietary loss to the United States is a prerequisite to the application of the suspension provision is *Marzani* v. *United States*, 168 F. 2d 133 (C. A. D. C.), affirmed by an equally divided Court, 335 U. S. 895, and reaffirmed by an equally divided Court on reargument, 336 U. S. 922.[10] That case held the suspension provision inapplicable to a prosecution under the False Claims Act for false swearing in investigations of the

[10] It should be noted that this conclusion affected only certain counts underlying the general sentence imposed on Marzani, with the result that the Government was not in a position directly to petition for certiorari on this issue. The issue was not raised by Marzani's petition but was argued by the Government in support of the judgment below. In the absence of an opinion, we do not know whether this Court considered that the Government had standing to raise the issue.

defendant's fitness for federal employment, on the ground that the offenses involved no pecuniary loss to the United States.

The *Marzani* opinion based its conclusion on the *Noveck*, *McElvain* and *Scharton* decisions, discussed *supra*, but none of those cases lend support to the holding that fraud under the suspension provision means pecuniary loss. As noted above, those decisions discuss the necessity that fraud be an ingredient of the crime, but not that the fraud ingredient be pecuniary. There was no occasion for such discussion in the *McElvain* and *Scharton* cases, since the evasion of taxes there charged necessarily involved a pecuniary loss to the United States. And the *Noveck* decision, as we have hitherto pointed out, specifically mentioned the general conspiracy statute as an example of an offense where fraud is an ingredient of the crime. By so doing, it negatived the pecuniary loss requirement, since it was well established, prior to the *Noveck* case, that a conspiracy to defraud covered interference with governmental functions. *Haas* v. *Henkel*, 216 U. S. 462, 479–480, and cases cited.

Petitioner's argument, based on the *Marzani* case, is effectively answered by Judge Learned Hand's opinion in *United States* v. *Gottfried*, 165 F. 2d 360, 368, certiorari denied, 333 U. S. 860, as follows:

> * * * The argument—drawn from the Congressional debates—is that this lan-

guage should be confined to frauds of those who contracted with the United States or supplied it with materials, and that it does not include interference even though fraudulent which results in no pecuniary loss. Textually this reasoning has nothing to commend it, except so far as the word "fraud," may imply pecuniary loss; and, whatever might be said as a new matter for so circumscribing that word, it has been the law, at least since 1910, that in the statute under which this indictment was drawn, "fraud" includes any conduct, "calculated to obstruct or impair its" (the United States') "efficiency and destroy the value of its operations and reports." We see no reason for reading the words, "defrauding the United States" in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar."

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[11] The *Gottfried* view was adopted in *United States* v. *Bridges*, 86 F. Supp. 922, 926 (N. D. Cal.), now on appeal in the Ninth Circuit.

United States v. *Obermeier*, 186 F. 2d 243 (C. A. 2), certiorari denied, 340 U. S. 951, a later decision of the Second Circuit, shows a narrowing view by that circuit of the fraud ingredient requirement as applied to a statute where fraud is less clearly spelled out than in the False Claims Act involved in *Gottfried* and the instant case, but does not at all affect the force of the *Gottfried* decision on the pecuniary loss requirement.

We submit that this is clearly the correct view; that the language and legislative history of the suspension statute and decisions of this Court all establish that crimes under the False Claims Act are crimes involving fraud under the suspension provision.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOHN R. WILKINS,
Attorneys.

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